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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, *Appellant*,

v.

RALPH L. SAMPSON, ET AL., *Appellees*.

*ON CERTIFICATION OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## APPELLEES' BRIEF IN OPPOSITION TO MOTION TO REMAND

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## INDEX


| | Page |
|---|---|
| Summary of Argument | 2 |
| Argument | 3 |
| Conclusion | 13 |
| Appendix | 14 |


## CITATIONS


CASES:

| | |
|---|---|
| Kann v. United States, 323 U.S. 88 | 1, 2, 7, 10, 12 |
| Parr v. United States, 363 U.S. 370, reversing 265 F. 2d 894 | 1, 2, 3, 7, 10, 12 |
| United States v. Borden Company, 308 U.S. 188 | 5 |
| United States v. Bramblett, 348 U.S. 503 | 6 |
| United States v. Halseth, 342 U.S. 277 | 6 |
| United States v. Hood, 343 U.S. 148 | 6 |
| United States v. Howard, 352 U.S. 212 | 6 |
| United States v. International Union, 352 U.S. 567 | 6 |
| United States v. Jones, 345 U.S. 377; remanding appeal from the District Court for the Southern District of Florida, 108 F. Supp. 266, to the Court of Appeals for the Fifth Circuit; on remand, 207 F. 2d 785 | 6, 10, 11 |
| United States v. Southeastern Underwriters Association, 322 U.S. 533 | 6 |
| United States v. Turley, 352 U.S. 407 | 6 |

STATUTES:

| | |
|---|---|
| Criminal Code, § 213, 18 U.S.C. § 1302 | 6 |
| Dyer Act, 18 U.S.C. § 2312 | 6 |
| Sherman Act, 15 U.S.C. § 2 (1958), 26 Stat. 209, as amended by 69 Stat. 282 | 6 |
| 16 U.S.C. § 852 (1958), 44 Stat. 576, as amended by 66 Stat. 736 | 6 |
| 18 U.S.C.: | |
| § 215 | 6 |
| § 610 | 6 |
| § 1001 | 6 |
| § 1341 (Mail Fraud Statute) | 1 |
| § 3731 (Criminal Appeals Act) | 2 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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No. 735

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UNITED STATES OF AMERICA, *Appellant,*

v.

RALPH L. SAMPSON, ET AL., *Appellees.*

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*ON CERTIFICATION OF APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## APPELLEES' BRIEF IN OPPOSITION TO MOTION TO REMAND

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The United States District Court for the Northern District of Georgia dismissed 35 of 44 counts of an indictment against appellees (hereinafter called "defendants") on the ground that the counts dismissed did not charge offenses under the mail fraud statute (18 U. S. C. § 1341). The district court relied on *Kann* v. *United States,* 323 U. S. 88, and *Parr* v. *United States,* 363 U. S. 370. The Government appealed to the Court

of Appeals for the Fifth Circuit under the Criminal Appeals Act (18 U. S. C. § 3731, quoted in Appendix, pp. 14-15). The court of appeals certified the case to this Court, holding that under the Criminal Appeals Act this Court's jurisdiction is exclusive because the issue raised by the appeal is the correctness of the district court's construction of the mail fraud statute. The Government has moved "for remand of the cause to the court of appeals on the ground that the district court construed the indictment and the Government's theory of prosecution embodied in the dismissed counts, and did not construe the mail fraud statute as such." (Motion to Remand, p. 2).

## SUMMARY OF ARGUMENT

There is no issue on this appeal as to the facts charged in the indictment but only as to whether those facts constitute a violation of the statute. In the district court, both parties recognized that the indictment charged a continuing scheme to defraud in the course of which the mailings at issue were in each instance subsequent to the collection of the money from the alleged victim. There was no misunderstanding of these facts by the district court. The district court held that mailings subsequent to the collection of the money, but while the scheme continued, were not violations of the mail fraud statute because they were not part of the "execution" of the scheme within the meaning of that statute as construed by this Court in *Kann* and *Parr*. The Government rested its case upon the argument that the continuing nature of the venture, or "continuing scheme", provided a basis for distinguishing *Kann* and *Parr*. The defendants pointed out in the district court in great detail that the *Kann* and

*Parr* cases also involved continuing schemes.[1] In dismissing the counts at issue here, the district court rejected the distinction suggested by the Government and adopted the construction of the mail fraud statute urged by defendants. The issue on appeal, then, is whether the proper construction of the statute is that urged by defendants or by the Government. This Court, therefore, has exclusive jurisdiction of the appeal, and the Government's motion to remand to the court of appeals should be denied.

## ARGUMENT

It is apparent that the district court's order dismissing the 35 counts was based solely upon the construction of the mail fraud statute. This order described all essentials of the scheme charged in the indictment, namely, that certain defendants would personally visit individuals and firms and, by numerous false representations, induce such persons and firms to sign applications for services and to pay advance fees therefor (R. 69); that such fees were immediately converted into cashier's checks (R. 69); and that such fees and applications were then transmitted to defendants' regional office, where the applications were ac-

[1] The portion of the *Parr* case pertinent here deals with counts 17 through 19, relating to a fraudulent scheme to obtain gasoline by use of credit cards belonging to the School District (363 U.S. 392-393). As to those counts, this Court held that "the scheme in each case had reached fruition" when defendants received the fruits of the fraud, and mailings occurring thereafter were not "for the purpose of executing the scheme" although the scheme to defraud the School District was still continuing. [This Court in the *Parr* case relied on other grounds in reversing convictions on Counts 1 through 16, based on "legally compelled" mailings relating to tax assessments and collections. The holding as to these first 16 counts is not pertinent for present purposes.]

cepted and the fees deposited in defendants' bank account (R. 70). The district court then quoted from the indictment the charge that, following the acceptance of the applications,

> ". . . . the defendants would mail to said victims a signed copy of the accepted application, together with a form letter, for the purpose of lulling said victims by representing [that] their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which they had falsely and fraudulently represented they would perform . . . ." (R. 70, quoting from R. 10).

After summarizing and quoting the indictment, the district court construed the mail fraud statute as follows, citing the two leading cases construing that statute:

> "The purpose of Congress in enacting Section 1341 was to prevent the Post Office from being used to carry out any scheme to defraud or to obtain money by false pretenses. This statute 'does not purport to reach all frauds but *only those limited instances in which the use of the mails is a part of the execution of the fraud,* leaving all other cases to be dealt with by appropriate state law.' *Kann* v. *United States,* 323 U.S. 88, 95. Thus only mailings which are 'a part of the execution of the fraud' or '*incident to an essential part of the scheme*' fall within the ban of the mail fraud statute. *Parr* v. *United States,* 363 U.S. 370 at page 391." [Italics by district court] (R. 71-72).

Finally, the district court stated its reason for dismissing those counts based on the mailings of accepted contracts and "lulling" letters, as follows:

> "It appears that the mailings involved in the remaining counts of the indictment relate to

> transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, supra, and the case of *Getchell* v. *United States*, 5 Cir. 282 F.2d 681, were not for the purpose of 'executing' the scheme." (R. 72).

The dismissal of the counts referred to was clearly based upon the district court's construction of the mail fraud statute, and in particular, the word "executing". As the court of appeals stated,

> "The District Court was declaring what the statute meant in its provision 'for the purpose of executing such scheme or artifice . . .' It was holding that using the mail in connection with transactions where the money had already been obtained from the victims did not constitute an 'executing' of the scheme."

The district court's opinion does not allude to any ambiguity in the indictment which it resolved one way rather than another, or to any defect in the indictment as a matter of criminal pleading. It deals solely with the substance of the charge. This was the only issue raised by defendants' Motion No. 1 (R. 44), which the district court sustained as to the 35 counts which it dismissed. The case therefore falls squarely within the rule stated by Mr. Chief Justice Hughes, speaking for a unanimous court, in *United States* v. *Borden Company*, 308 U.S. 188, 198:

> ". . . (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute."

This Court clearly has jurisdiction where the issue is the construction of a particular word or phrase in a statute, here the statutory phrase "for the purpose of executing."[2]

The Government admits that the construction of the mail fraud statute was "unquestionably one aspect of the district court's decision" (Motion to Remand, p. 8), but argues vaguely that the district court also misconstrued the indictment. The Government does not state precisely in what respect the district court misconstrued the facts charged in the indictment, and points to nothing in the district court's order indicating that it found the indictment ambiguous, vague, or indefinite (as was the indictment in the only case cited on this point by the Government, *United States* v. *Jones*, 345 U.S. 377, discussed below). As best we can understand it, the Government is suggesting that the district court failed to understand that the scheme alleged in the indictment was a continuing one aimed at numerous individuals, and that the letters

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[2] Compare: *United States* v. *Turley*, 352 U.S. 407, involving construction of the term "stolen" in the Dyer Act, 18 U.S.C. § 2312; *United States* v. *Southeastern Underwriters Association*, 322 U.S. 533, 536, involving construction of the term "commerce" in the Sherman Act, 15 U.S.C. § 2; *United States* v. *Halseth*, 342 U.S. 277, involving construction of the phrase "concerning any lottery", in § 213 of the Criminal Code, 18 U.S.C. § 1302; *United States* v. *Hood*, 343 U.S. 148, involving construction of the phrase "any appointive office or place under the United States" in 18 U.S.C. § 215; *United States* v. *Bramblett*, 348 U.S. 503, involving construction of the phrase "in any matter within the jurisdiction of any department or agency of the United States", in 18 U.S.C. § 1001; *United States* v. *Howard*, 352 U.S. 212, involving construction of the phrase "contrary to the law of the state" in 16 U.S.C. § 852; and *United States* v. *International Union*, 352 U.S. 567, involving construction of the word "expenditures" in 18 U.S.C. § 610.

supporting the dismissed counts were alleged to have "lulled" the recipients by representing that the promised services would be performed.

The Government suggests that the district court misconstrued the indictment as charging a "separate terminable scheme as to each individual victim." (Motion to Remand, p. 8). But, as the Government correctly asserts, the alleged scheme "obviously encompassed more than the defrauding of any one particular individual." (Ibid, p. 9). This is so obvious from the indictment that it is surprising that the Government now contends that the district court failed to comprehend it. The first two lines of the indictment charge "That, beginning prior to March 9, 1956, and continuing until June 1, 1959" (R. 1), the defendants devised and intended to devise a scheme and artifice to defraud. The indictment then charges that the scheme was aimed, not only at 46 specifically named persons (R. 2), but also at "numerous and divers other persons throughout the United States. . . ." (R. 3). It charges more than 40 mailings, spanning a period of sixteen months, from January 6, 1958 (R. 17) through May 16, 1959 (R. 29). Thus, the continuing nature of the alleged scheme is clearly charged. There is certainly no warrant for assuming as a premise, as the Government does, that the district court overlooked the obvious, when there is nothing in the district court's order indicating any such misunderstanding. On the contrary, the district court's order shows a clear understanding of this aspect of the indictment (R. 70). The district court simply held that the continuing nature of the scheme alleged in the indictment provided no basis for distinguishing the *Kann* and *Parr* cases, which also

involved continuing schemes covering an extended period of time.

The Government also states that the district court's order "over-looks the impact" of the so-called "lulling" letters on which the Government relies (Motion to Remand, p. 10), and suggests that the Court somehow misconstrued the indictment "as supplemented by the bill of particulars." (Ibid, pp. 9, 12). The Government surely cannot intend to argue that the district court actually overlooked the sample letter reproduced in the record (R. 61), since it was incorporated into the record by an "Amendment to Order of Dismissal" (R. 77), which was initiated by the Government itself and which recites that portions of the Government's "Supplemental Brief" (R. 46-65) were treated as a bill of particulars. The Government's argument seems intended to imply that the nature and significance of the matter mailed (i.e., the "lulling" letters) does not appear from the indictment, but is only revealed by the sample letter itself (R. 61). The fallacy of this argument is that the inclusion of the full text of this sample letter adds nothing to the clear charge in the indictment, which summarizes the substance and purpose of this letter as follows (R. 10):

> "... defendants would mail to said victims a signed copy of the accepted applications, together with a form letter, for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said victims the valuable services which the defendants had falsely and fraudulently represented that they would perform...."

The district court's order quotes this portion of the indictment (R. 70). The Government makes no attempt to show that the sample letter had any significance—much less "impact"—beyond what was already alleged in the indictment.

The Government's present position that the district court misconstrued the indictment appears to be an afterthought devised to avoid a decision by this Court of an important question of statutory construction. The Government's brief on the merits in the court of appeals—which was filed before the defendants filed their motion to certify the case to this Court—did not argue that the district court had misconstrued the indictment. On the contrary, as the court of appeals pointed out, the Government's brief on the merits in that court described the ruling of the district court as follows:

> "In so ruling, the Court has adopted the position that even though a fraud scheme encompasses dealings with numerous victims and continues for a number of years, relying, as it must, for success upon the pacifying and lulling of past victims as well as the finding of new ones, that once a victim has parted with his money no further mailing by the fraud operators to him can possibly be a part of the execution of the fraud. This ruling is based upon a misconception of the law of mail fraud." (Appellant's brief on merits in court of appeals, p. 14, as quoted by court of appeals. See Appendix to Government's Motion to Remand, p. 18, Note 1.).

This quotation shows that the Government then contended that the district court's ruling was "based upon a misconception of the law of mail fraud", which is

simply another way of saying that it was based upon a misconstruction of the mail fraud statute. It also shows that the Government did not then contend that the district court misunderstood the indictment; rather, the Government then complained that the district court had dismissed certain counts "even though" they charged a continuing scheme "encompassing dealings with numerous victims" and dependent "for success upon the pacifying and lulling of past victims."[3]

The one case relied upon by the Government, *United States* v. *Jones*, 345 U.S. 377,[4] involved an indictment later characterized by the court of appeals as "duplicitous, ambiguous and argumentative". 207 F. 2d at 787.

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[3] The recognition on all sides that the indictment charged a continuing scheme is further reflected in the "Supplemental Brief" filed by the Government in the district court which has been incorporated in the record (R. 46-65). In this brief, the Government summarized the contentions of the parties as follows:

> "They [defendants] argue that these cases [Parr, Kann and Getchell] hold that once money is obtained from the victim, further mailings cannot be the basis of an indictment, *whether or not the scheme had ended*. . . . (R. 50) (Emphasis in original).
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> • • •
>
> "The movants here have argued, so vigorously as to sound very convincing, that the *Kann* case, and *Parr* case which followed it, have ruled that a mailing made after the money is collected is not a valid basis of prosecution, *whether the scheme is ended, or not*. We have, we believe, shown here that neither of these cases, nor any other case, has ever established such a rule. We have cited cases decided before and after the *Kann* case and the *Parr* case to show that the question is now, *as it has always been*, that of *whether the mailing is in furtherance of the scheme*." (R. 58-59) (Emphasis supplied).

[4] Remanding appeal from the District Court for the Southern District of Florida, 108 F. Supp. 266, to the Court of Appeals for the Fifth Circuit; on remand, 207 F. 2d 785.

In view of this ambiguity, the district court found it necessary to construe the indictment as to whether it charged that the purpose of certain punishment administered to a State prisoner was to extort confessions and inflict summary punishment in violation of constitutional rights, or merely to discipline the prisoner. Unlike the case at bar, the district court in the *Jones* case expressly construed the indictment, stating:

> "Both counts are subject to the construction that the whippings were administered for the purpose and with the intent of disciplining said prisoners for having illegally escaped, and I so construe the allegations of each count." 108 F. Supp. at 268.

In the *Jones* case, the Government contended that the indictment should have been construed as charging punishment to extort confessions and inflict summary punishment in violation of constitutional rights. This Court remanded the case to the court of appeals so that it could construe the ambiguous indictment to determine whether its allegations were such as to support the Government's theory of prosecution. But in the case at bar, neither the district court nor the parties found any significant ambiguity in the dismissed counts of the indictment. The district court did not hold that the *indictment* fails to support the Government's theory of prosecution; but rather that the *mail fraud statute*, properly construed, fails to support the Government's theory of prosecution. Moreover, the court of appeals, to which the Government would have this case remanded, has already reviewed the record and found no issue as to an ambiguity in the indictment such as the Government now suggests, but only an issue as to the construction of the statute.

This case raises an important question as to the proper construction of the statutory phrase requiring that a mailing be "for the purpose of executing" the scheme. The Government argued in the district court and presumably still contends that the "correct criterion" under the mail fraud statute is "whether the mailing acts in some way to further a continuing scheme," (R. 57) and repeatedly stated the test as being whether a mailing "furthers" or is "in furtherance of" a scheme. (See R. 49, 54, 55, 59). Obviously the phrase "in furtherance of" is much broader than the statutory phrase "for the purpose of executing". Defendants contended in the district court and contend now that the word "executing" is to be narrowly construed, particularly in the context of a criminal statute, and that the *Kann* and *Parr* cases support this narrow construction. This issue as to the proper scope of the statutory term "executing" is now squarely before this Court for decision under the Criminal Appeals Act.

The Government may well be anxious to avoid a decision of this case by this Court, which recently construed the mail fraud statute narrowly in the *Parr* case, and may prefer a decision by the court of appeals, which originally decided the *Parr* case in the Government's favor. *Parr* v. *United States*, 265 F. 2d 894. However, the Criminal Appeals Act does not give the Government an option to choose its forum: and the Government should not be allowed to accomplish this result indirectly by injecting into the case an artificial issue and contending that the indictment carries some hidden ambiguity which has not been apparent to the defendants, the district court or the court of appeals.

## CONCLUSION

We respectfully submit that this Court has exclusive jurisdiction of this appeal, and that the Government's motion to remand the case to the court of appeals should be denied.

Respectfully submitted,

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## APPENDIX

### Criminal Appeals Act, 18 U.S.C., Section 3731

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. June 25, 1948, c. 645, 62 Stat. 844, amended May 24, 1949, c. 139, § 58, 63 Stat. 97.